Served: April 13, 1992

NTSB Order No. EA-3540

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of April, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v. SE-12393

STEVE BEN-HANANIA,

Respondent.

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge Jimmy N. Coffman rendered in this proceeding on February 28, 1992, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge affirmed an emergency order of the Administrator revoking respondent's private pilot certificate for his alleged operation of an

[1]An excerpt from the hearing transcript containing the initial decision is attached.

aircraft at a time when his certificate was under suspension,[2] in violation of sections 61.3(a) and 91.13(a) of the Federal Aviation Regulations, "FAR," 14 CFR Parts 61 and 91.[3] Because we conclude, for the reasons discussed below, that respondent has not presented any objection warranting a reversal of the initial decision, we will deny his appeal.[4]

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[2]Respondent's certificate had been suspended indefinitely pending his successful completion of a re-examination of his qualifications to hold a private pilot certificate. Respondent had surrendered his certificate in January, 1991 after having twice failed re-examinations, and he did not reacquire his certificate until September of that year, when he succeeded, following four additional failures, in passing such a re-examination.

[3]FAR sections 61.3(a) and 91.13(a) provide as follows:

"§61.3 **Requirement for certificates, ratings, and authorizations.**

(a) **Pilot certificate**. No person may act as pilot in command or in any other capacity as a required pilot flight crewmember of a civil aircraft of United States registry unless he has in his personal possession a current pilot certificate issued to him under this part. However, when the aircraft is operated within a foreign country a current pilot license issued by the country in which the aircraft is operated may be used.

"§91.13(a) **Careless or reckless operation.**

(a) **Aircraft operations for the purpose of air navigation.** No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[4]We note for the record that respondent's appeal brief appears to have been filed some two days late, and, therefore, may be subject to dismissal under Section 821.57(b) of our Rules of Practice, 49 CFR Part 821. However, because we cannot tell from the record whether there is good cause to excuse the tardiness, and the time constraints applicable to an emergency proceeding preclude us in this case from ascertaining the answer to that question, we have determined to proceed to a decision on the merits.

The January 29, 1992 Emergency Order of Revocation alleges, in pertinent part, as follows:

> 1. You are the holder of Private Pilot Certificate No. 63440403.
>
> 2. By Order dated January 24, 1991, your Private Pilot Certificate was suspended on an emergency basis pending successful completion of a reexamination of your qualifications to hold such certificate.
>
> 3. On or about January 28, 1991, you surrendered your certificate pursuant to the above-mentioned emergency order of suspension.
>
> 4. On or about June 8, 1991, and while your Private Pilot Certificate was under suspension, you acted as pilot-in-command of a Piper PA28-140 aircraft, identification number N43078 on a passenger carrying flight in the vicinity of Linden Airport, Linden, NJ.

The Administrator's evidence included the eyewitness account of a former flight instructor of respondent. He testified that he was certain that he had seen respondent operate (specifically, taxi and take off in) his Piper aircraft as alleged in paragraph 4 of the emergency order, which served as the complaint herein. The law judge found this witness' testimony to be more believable than the testimony provided by respondent's son and ex-wife, whose recollections, not of the specific Saturday in question some eight months earlier, but of their normal routine on Saturdays, placed respondent at his home during the timeframe the instructor indicated he had seen respondent at the airport.

We find no merit in respondent's challenge to the law

judge's credibility assessment in favor of the Administrator's witness, either on the ground that the law judge could not appropriately consider what a witness has to "gain" or "lose" in determining credibility, or on the ground that, since another individual with the instructor at the airport could not identify respondent as the person operating the Piper aircraft, the instructor's testimony was insufficient to prove the Administrator's case.

As to the first point, while a witness' motivation for testifying in a particular way may have no direct bearing on his ability to have perceived something accurately, it is clearly a relevant factor for a law judge to consider in evaluating the likelihood that the witness testified truthfully. Credibility assessments are not open to attack simply because they might be predicated to some degree on a witness' presumed interest in the outcome of a proceeding, rather than limited to an analysis of perceptual factors that may have affected the witness' observations. Indeed, if credibility assessments did not embrace such extra-perceptual considerations, there would be little justification for deferring to our law judge's resolution of conflicting or contradictory versions of events, based on their having had the opportunity to watch the witnesses present their testimony, for firsthand knowledge of witness demeanor would be of no particular benefit in judging whether one witness' observations were superior to another's.

As to the second part of respondent's argument on the validity of the law judge's credibility finding, we do not think the fact that the recollections and observations of the Administrator's two percipient witnesses were not identical undermines the law judge's acceptance of the instructor's identification of respondent as the person he saw operating an aircraft on June 8, 1991. It is not uncommon for two or more witnesses to the same event to recall it differently, but even if it were, respondent's point would be unavailing. The differences between the instructor's and the Linden Air Service employee's testimony do not appear to reflect anything more than their disparate respective memories concerning the movement of an aircraft that they witnessed from close but not identical vantage points. The law judge was aware of these differences, but nevertheless determined, after observing all of the witnesses for both parties testify, that the instructor's identification should be credited even though the Administrator's other percipient witness, for whatever reason, appears not to have seen, or been able to discern, the pilot.[5] We find no basis in the disparity between their observations in this or any other regard pressed by

[5]It is not entirely clear from the record whether the individual piloting the aircraft could have been easily seen at the time the instructor directed the other individual's attention to the aircraft as it taxied across in front of the lobby of the Linden Air Service building and turned right to head out toward the runway. What is clear is that the instructor was on June 8, 1991 familiar with respondent's appearance and the Linden employee was not.

respondent for disturbing the law judge's credibility assessment or for finding that the testimony of the instructor alone is an inadequate evidentiary foundation for affirming the Administrator's charges.

The respondent next argues that the law judge erred by not dismissing the Administrator's complaint as stale, inasmuch as the emergency order of revocation was issued more than six months after the alleged flight, and by not striking the testimony of the FAA inspector who investigated this matter, on the ground that the Administrator had wrongly failed to produce the inspector's report during discovery. We find no merit in either argument.

Dismissal under the Board's stale complaint rule, 49 CFR 821.33, was not available to respondent because the Administrator's complaint clearly raised an issue of respondent's qualifications to hold an airman certificate.[6] See, e.g., Administrator v. Dunn, 5 NTSB 2211 (1987). Thus, the rule was inapplicable by its own terms, and the judge properly denied respondent's motion under that rule.[7]

[6]The Administrator's complaint raised an issue of lack of qualifications in that an individual who operates an aircraft when his certificate is suspended cannot be said to possess the care, judgment and responsibility required of a certificate holder. Moreover, respondent's alleged violations are all the more serious because the basis for the suspension he allegedly defied was that he lacked the operational competence required of a certificate holder.

[7]We agree, moreover, with counsel for the Administrator that the possibility that respondent's witnesses' recollections of

Respondent contends that the testimony of the investigating inspector should have been struck by the law judge because the report of his investigation submitted to FAA counsel, which assertedly contained notes on a conversation he had with respondent about his suspected operation of his aircraft on June 8, was not given to him prior to hearing pursuant to a discovery request. We find it unnecessary to rule on whether the Administrator was obligated to turn over the section of the report in which the notes apparently were placed, namely, the analysis and recommendations section of the Enforcement Investigative Report ("EIR"), for we are unable to conclude that the failure to produce that part of the report prejudiced the respondent, who had ample opportunity to cross examine the inspector concerning any of his conversations with him.[8] Respondent did not need advance notice of the reasons why the inspector did not believe his denial of having flown while

(..continued)
the events on the date in issue might have been stronger if less time had elapsed between incident and complaint (namely, about 8 months) does not establish actual prejudice based on delay. See Administrator v. Peterson, NTSB Order EA-2989 (1989). In this connection, the Administrator maintains that it took several months for him to determine that respondent's brother had not flown the Piper aircraft on June 8, as respondent had originally claimed.

[8]At the same time, we must confess that we are unaware of any routine practice by our law judges of ordering the Administrator to produce the so-called "deliberative process" information in the EIR. However, we do not mean to suggest that the discoverability of notes reflecting the substance of a conversation is dependent on where the Administrator chooses to place them in his files.

suspended in order effectively to prepare his defense.

In view of the foregoing, we find that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order. We adopt the findings and conclusions of the law judge as our own.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied, and

2. The initial decision and the emergency order of revocation are affirmed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.